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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

SUAD SALIM RAYYIS,

Defendant and Appellant.

B205364

(Los Angeles County
Super. Ct. No. BA269903)

APPEAL from an order of the Superior Court of Los Angeles County. Steven R. Van Sicklen, Judge. Affirmed in part, reversed in part, and remanded with directions.

Law Offices of Richard A. Moss, Richard A. Moss and Jerry B. Marshak for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lance E. Winters and David Zarmi, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

The sole issue in this appeal is the calculation of the amount of restitution (Penal Code, § 1202.4) owed by Suad Salim Rayyis to the Franchise Tax Board (FTB). We conclude that in calculating the amount of restitution, the trial court correctly included the amount of taxes Rayyis had acknowledged he owed but had failed to pay. In contrast, we find the trial court erred in allowing interest on taxes paid, which had been paid when due, because that amount was a windfall to the FTB. We affirm in part and reverse in part the trial court order, and remand the case to the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

Rayyis, a physician, was charged with five felony counts of willful failure to file an income tax return (1998 to 2002); 13 counts of money laundering; and other misdemeanor crimes. (*Rayyis v. Superior Court* (2005) 133 Cal.App.4th 138, 142.) A month after the felony complaint was filed, Rayyis filed tax returns for years 1998 to 2002. (*Ibid.*) The information was amended to add an additional five counts of filing a false tax return. (*Ibid.*)

Rayyis pled guilty to a violation of section 19706 of the Revenue and Taxation Code and executed a *Harvey* waiver (*People v. Harvey* (1979) 25 Cal.3d 754).¹ A *Harvey* waiver permits a sentencing court to consider counts that were dismissed under a plea bargain and that are not transactionally related to the admitted offense. (*In re Carl N.* (2008) 160 Cal.App.4th 423, 426, fn. 3.)

¹ Section 19706 of the Revenue and Taxation Code provides: “Any person or any officer or employee of any corporation who, within the time required by or under the provisions of this part, willfully fails to file any return or to supply any information with intent to evade any tax imposed by Part 10 (commencing with Section 17001) or Part 11 (commencing with Section 23001), or who, willfully and with like intent, makes, renders, signs, or verifies any false or fraudulent return or statement or supplies any false or fraudulent information, is punishable by imprisonment in the county jail not to exceed one year, or in the state prison, or by fine of not more than twenty thousand dollars (\$20,000), or by both the fine and imprisonment, at the discretion of the court, together with the costs of investigation and prosecution.”

When he pled guilty, the court ordered Rayyis to make restitution pursuant to Penal Code section 1202.4, subdivision (f), but did not set the amount of restitution or the cost of investigation.²

1. *Restitution Hearing*

At a hearing to determine the amount of restitution, John Cheslock, an investigator for the Los Angeles County District Attorney, testified that Rayyis had told him he was involved in insurance fraud activity from 1995 through 2003.

Manuel Palencia, a special agent with the FTB, testified for the prosecution providing three different scenarios for the trial court. Under the scenario adopted by the court, Palencia allowed for expenses, taxes and interest, and calculated the amount of restitution to be \$165,514. Palencia acknowledged that in 1999, the FTB seized \$206,860.18 and in 2000, the FTB seized \$15,990.30 in Medi-Cal warrants owed to Rayyis. Palencia's calculation did not include taxes identified in Rayyis returns filed in 2004 but never paid to the FTB. Palencia's interest calculations did not take into consideration the timing when the warrants were seized, but instead subtracted the amount seized after all interest calculations had been made.

Frances Zuniga, a certified fraud examiner with the Internal Revenue Service and court appointed expert, testified for the defense. He testified that "an involuntary seizure is deemed credited to the account on the date of seizure." Zuniga faulted Palencia for calculating interest without applying any credits for the Medi-Cal warrants.

Zuniga calculated the tax loss to be \$1,315. He defined tax loss as follows: "Tax loss is the difference between the tax on the corrected income versus the tax that was previously reported or previously assessed." The tax loss did not include the amount that Rayyis said he owed but did not pay. Zuniga testified that "if you're looking at . . . the

² Penal Code section 1202.4, subdivision (f) provides in part: "Except as provided in subdivision (q), in every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court. . . ."

false statement on the return or the tax loss . . . it seems to me all you want to look at is what the deficiency is.” Zuniga agreed that Rayyis should pay interest on taxes that were not paid.

2. Court Findings

The court found Revenue and Taxation Code section 17282, which disallows deductions on income from illegal activity, to be inapplicable. The court found there was no segregation of the legal income from the illegal income and therefore Rayyis should not be barred from the deductions. Noting that the issue was not in dispute, the court ordered Rayyis to pay the cost of investigation of \$26,349.

The court ordered Rayyis to pay interest in the amount of \$100,513. The court found that the amount of victim restitution was based on the tax due as opposed to the tax owed; it did not factor the seized money into the calculation until after interest had accumulated. Total tax owed plus interest amounted to \$139,165.

Rayyis timely appealed from the trial court’s order.

DISCUSSION

We review a trial court’s restitution order for abuse of discretion. (*People v. Thygesen* (1999) 69 Cal.App.4th 988, 993 (*Thygesen*)). “There is no requirement the restitution order be limited to the exact amount of the loss in which the defendant is actually found culpable, nor is there any requirement the order reflect the amount of damages that might be recoverable in a civil action.” (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121.) “[T]he trial court must use a rational method that could reasonably said to make the victim whole, and may not make an order which is arbitrary or capricious.” (*Thygesen*, at p. 992.)

A court is required to order full restitution unless there are compelling reasons not to do so. (*People v. Giordano* (2007) 42 Cal.4th 644, 656.) “Restitution is commonly understood as ‘an act of restoring or a condition of being restored . . . (a) a restoration of something to its rightful owner[,] (b) a making good of or giving an equivalent for some injury.’ [Citation.] It obligates the defendant wrongdoer to restore to the victim the value of those things he or she was deprived of by the wrongful act.” (*People v.*

Boudames (2006) 146 Cal.App.4th 45, 52.) Restitution does not include penalties. (*Ibid.*) The Legislature intended to make the victim whole for every economic loss. (*Thygesen, supra*, 69 Cal.App.4th at p. 994.) The purpose is not to give the victim a windfall. (*Id.* at p. 995.)

I. *Restitution Based on Taxes That Rayyis Acknowledged but Never Paid Was Within the Trial Court’s Discretion*

After the complaint was filed, Rayyis filed tax returns acknowledging that he owed \$37,337. (The returns are not included in the record, but there appears to be no dispute as to the amount.) There was no abuse of discretion in including the \$37,337 in the restitution order because that amount was never paid. It was necessary to include that amount in order to make the FTB whole. That Rayyis already disclosed that he owed the money is irrelevant for purposes of making the FTB whole because it does not show that the FTB received the money it was owed. The trial court was not charged with calculating the amount of “tax loss,” but instead with calculating the amount that would make the victim whole for its economic loss.

II. *Interest Based on Taxes Paid When Due Constituted an Abuse of Discretion*

The FTB seized warrant payments but did not apply them to the specific tax year. As a result, interest accrued. Rayyis argues that it was improper to add interest to the years where payments had been timely made through the seizure of warrants. According to him, the FTB cannot assess interests on taxes that “were *actually paid when due.*” The Attorney General counters that the interest was appropriate because Rayyis did not file tax returns until 2004 and his tax liability was not assessed until the restitution hearing in 2004.

Rayyis has the better argument. It is undisputed that the FTB had possession of the money from Rayyis in 1999 and 2000. That money should have been credited to Rayyis’s tax obligations and interest should accrue only on the unpaid amount. Reimbursement should compensate the government for its actual loss. (*People v. Hudson* (2003) 113 Cal.App.4th 924, 928, fn. 2.) The FTB was entitled to interest on money that it did not have, but not where it received actual timely payment by seizing Rayyis’s

Medi-Cal warrants. The Attorney General's argument that the calculation was not made until 2007 and that Rayyis did not file returns until 2004 does not show that the methodology could reasonably be said to make the victim whole. The FTB already had a portion of the money on which it was assessing Rayyis's interest.

CONCLUSION

Appellant challenges only the amount of his tax liability. He does not challenge the calculation of costs of prosecution, and there is no dispute that the \$26,349 must be included (as the Attorney General argues). The trial court correctly considered the \$37,337 in taxes that Rayyis did not pay even though Rayyis belatedly acknowledged that he owed the money. The trial court improperly calculated interest on tax amounts that were paid when due. Interest is appropriate only on the money that was not paid when due. We remand the case to the trial court to recalculate the amount of restitution.

DISPOSITION

The trial court's restitution order dated November 8, 2007, is affirmed in part and reversed in part. The amount of interest (\$100,513) and the calculation of tax owed plus interest (\$139,165) are reversed. The case is remanded to the trial court to recalculate the amount of restitution owed in such a manner where interest accrues only on tax liability that was not paid when due. In all other respects, the order is affirmed.

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COOPER, P. J.

We concur:

RUBIN, J.

FLIER, J.